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NOT TO BE PUBLISHED

Commonwealth Of Kentucky

Court of Appeals

NO. 2003-CA-002154-MR

GARY WEISENTHAL — APPELLANT

v.

APPEAL FROM JEFFERSON CIRCUIT COURT
HONORABLE STEPHEN P. RYAN, JUDGE
ACTION NO. 99-CI-004770

CITY OF STRATHMOOR MANOR — APPELLEE

OPINION
AFFIRMING

** ** ** ** **

BEFORE: KNOPF AND TACKETT, JUDGES; ROSENBLUM, SENIOR JUDGE.[1]

TACKETT, JUDGE: Gary Weisenthal appeals from the decision of the Jefferson Circuit Court which granted summary judgment in favor of the appellee City of Strathmoor Manor on Weisenthal's counterclaim against the City for interference with his use of a dedicated public way. The City had filed this action against Weisenthal for his repeated attempts to use Lakeside Drive for

[1] Senior Judge Paul W. Rosenblum sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and KRS 21.580.

vehicular traffic, including removal of trees, vegetation, signs and barricades on public property. Weisenthal argues on appeal that the court should have granted summary judgment in his favor on his counterclaim, which sought an injunction against interference with his use of the walkway for vehicular traffic, and denied the City's motion for summary judgment on the counterclaim. We disagree, and affirm.

The City of Strathmoor Manor was incorporated in 1931, abutting the city of Louisville's southern boundary. The City later annexed a portion of Lakeside Drive, including the unimproved segment between Lowell and Eastview Avenues that borders Weisenthal's property. Weisenthal purchased his property in 1948, and his south property line is on the boundary between Strathmoor Manor and Louisville. Lowell and Eastview Avenues are parallel, and Lakeside Drive was platted as a public way but only partly improved. Neither Strathmoor nor Louisville has used the section between Eastview and Lowell for vehicular traffic even though it is platted as a public way; its only public use has been as a pedestrian walkway.

In 1990, Weisenthal divided his property into two parcels and constructed a home on the rear lot, which fronts on Lakeside Drive between Eastview and Lowell. It is the only home that fronts on that section of the public way. Since constructing that home, Weisenthal has intermittently used the

walkway as a driveway between Lowell and Eastview Avenues. He has removed barricades, signs, and vegetation, and constructed a roadway. Both the City and his neighbors have asked him not to use the public way as a through street, and he has acquiesced for extended times since 1990. The parties stipulated that the home has unimpeded access from Eastview Avenue.

The present action was brought for trespass to both public and private property and destruction of public property. Weisenthal counterclaimed, seeking injunctive relief against the City's interference with an alleged right to use the public way for vehicular traffic. The City's original complaint sought money damages; later, the City elected to abandon those claims in favor of a determination of the respective rights of the parties regarding the use of Lakeside Drive. Cross-motions for summary judgment on the counterclaim were filed, and, there being no material facts in dispute, the court granted summary judgment in favor of the City and denied Weisenthal's request. This appeal followed.

On appeal, Weisenthal first argues that the City should not have been allowed to dismiss its claims for damages, since he has expended a great deal of money and effort in defending those claims. We fail to see how Weisenthal could be prejudiced by the dismissal of those claims. Given that he has admitted the destruction of public property, the chances that he

would have been held liable and ordered to pay were quite high. We fail to see how, under the Sublett v. Hall[2] rule, he would suffer substantial injustice by the City's decision not to seek monetary damages against him.

Next, Weisenthal argues that he was entitled to the requested relief, and that his motion for summary judgment should have been granted. The court found, and we agree, that there was no evidence that the portion of the public way had been established as a street open to vehicular traffic, and that a landowner may not unilaterally force the opening of a public way to vehicular traffic. A way dedicated to public use cannot be regarded as a public road until it is legally accepted and established as a public road. KRS 82.400, KRS 178.020, Salyers v. Tackett, 322 S.W.2d 707 (Ky. 1958). The court reasoned that dedication of land to public use is not confined to usages known at the time of dedication, but includes the right of the public to use the property in another convenient way – in this case, a pedestrian walkway. Unknown Heirs of Devou v. City of Covington, 815 S.W.2d 406 (Ky. App. 1991).

The court also cited Rieke v. City of Louisville, 827 S.W.2d 694 (Ky. App. 1991) for the proposition that a landowner's right to street access is a right of reasonable access to the street system and not to a particular street; the

[2] 586 S.W.2d 888 (Ky. 1979).

appropriate governmental entity has the right to choose which street a landowner may access in the course of the reasonable administration of its street system. Therefore, the court reasoned, and we agree, that the City may designate that Weisenthal's access to the street system is through Eastview Avenue and not Lakeside Drive.

For the foregoing reasons, the judgment of the Jefferson Circuit Court is affirmed.

ALL CONCUR.

BRIEF FOR APPELLANT:

Fred R. Simon
Louisville, Kentucky

BRIEF FOR APPELLEE:

John W. Harrison, Jr.
Louisville, Kentucky